IN THE HIGH COURT OF BOMBAY AT GOA

Second Appeal No.19/2006

1. Miss Alba Sequeira,
   r/o. Baman Vaddo, Siolim, Bardez, Goa.
2. Mr. Vithal Sequeira,
   r/o. Baman Vaddo, Siolim, Bardez, Goa.
3. Dr. Antonio Precioso Sequeira,
   r/o. La Oceana, Dona Paula,
   Panaji, Goa.
4. Mrs. Jennifer Sequeira,
   r/o. La Oceana, Dona Paul,
   Panaji, Goa. ..... Appellants.

V/s.

1. Meenakshi Madkar,
   r/o. Oxel Gulbavaddo, Siolim, Goa.
2. Laxmi Madkar,
3. Nagesh Raya Madkar,
4. Dinesh Raya Madkar,
5. Mahesh Raya Madkar,
6. Rupesh Raya Madkar,
7. Lalita Raya Madkar,
8. Sudha Raya Madkar,
   The respondents at sr. No. 2 to 8
   All r/o. Golant Marna,
   Igrejavaddo, Siolim, Bardez, Goa.
9. Madhuri Madkar,
   r/o. Golant Marna,
   Siolim, Bardez, Goa.
10. Mr. Raghuvir Madkar,
    r/o. Igreja Vaddo, Golant,
    Marna, Siolim, Bardez, Goa
11. Mr. Mahadev Madkar,
    r/o. Igreja Vaddo, Golant,
    Marna, Siolim, Bardez, Goa.

12. Mr. Joaquim de Silva,
    Dr. Mukund Building,
    Flat No.10, 2nd Floor,

Vasco-da-Gama, Goa.
13.Mrs. Selma Sequeira de Silva,
Dr. Mukund Building,
Flat No.10, 2nd Floor,
Vasco-da-Gama, Goa. ..... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mrs. S. Rao, Advocate for the appellants.

Mr. P. S. Rao, Advocate for respondents No.9 and 11.

CORAM : P.V. KAKADE, J.

DATE : 26TH SEPTEMBER, 2006.

ORAL ORDER :

Heard the learned Counsel for both the parties. Perused the record..

2. The unsuccessful plaintiffs have preferred this appeal against the Judgment and Order passed by the lower appellate Court dismissing the appeal and confirming the Judgment and Order passed by the Civil Judge, Jr. Division, Mapusa dismissing the suit against the defendants.

3. The plaintiffs came with a case that the plaintiffs and the defendants No.4 and 5 are co-owners in possession of the property surveyed under No.114/1 in Marna Village of Bardez Taluka and the

defendants are residing in the property bearing survey No.114/2. According to the plaintiffs, the defendants have a house, cattle shed existing in the property which is termed as “the suit property” in the plaint. The plaintiffs have also mentioned in the plaint that the defendants have applied for mundkarship registration in respect of the property bearing Survey No.114/2. The cause of action, according to the plaintiffs, accrued when the defendants illegally encroached upon the suit property in the month of April, 1988 and the said illegal construction is mentioned in the plaint as the “suit structure”. It is the case of the plaintiffs that the defendants have put up the suit structure without the consent or permission of the plaintiffs. The plaintiffs have averred that they got the said encroachment measured by a Government approved Surveyor and it was found that the total area encroached upon by the defendants admeasured 120 sq. metres. Thereafter the plaint was amended incorporating the facts that pending the suit, the defendants have further encroached into the suit property in November, 1993 by constructing illegally a fencing of bamboo and wooden poles and have illegally encroached upon the pathway by enclosing approximately 6 metres of the suit property belonging the the plaintiffs. It was further stated that in the year 1996, the defendants further encroached in the plaintiffs' property towards the rear of the defendants' house by erecting

another fencing made up of bamboo and wooden poles, thus encroaching upon 30 sq. metres. It is also the case sought to be made out on behalf of the plaintiffs that in the year 1993-94, the defendant No.3 trespassed into the plaintiffs *godgo* by tying his bulls and dumping dry hay, for which the plaintiff No.1 also filed a police complaint. It is further the case sought to be made out by the plaintiffs that in the year 1993, the defendant No.3 and his family have illegally substituted the wooden poles of cowshed constructed illegally by them by replacing them with pillars of laterite stones and the roofing of the cowshed has been substituted with local tiles. It is the case of the plaintiffs that defendants are not entitled to encroach upon their property and hence the suit. The defendants challenged velocity of the plaint, denying all the allegations of the plaintiffs with the submission that they are residing in the suit dwelling house for last many years as *mundkars*. According to the defendants, they have not illegally encroached into the suit property at any time and that cowshed is also existing in the suit property since long.

4. On the basis of the pleadings and the available evidence, the trial Court held that the plaintiffs have failed to prove that the defendants had encroached upon 20 sq. metres area of the plaintiffs' property by extending the construction and therefore, liable to be demolished. It was

further held that the plaintiffs have failed to prove the subsequent alleged encroachment and the alleged trespass over the plaintiffs' property and consequently, the suit came to be dismissed. The appeal was carried to the District Court. The learned Addl. District Judge, Mapusa, after hearing both the parties, concurred with the findings recorded by the trial Judge and dismissed the appeal.

5. At the outset, it must be noted that though such substantial question was not raised in the appeal, the learned Counsel for the appellants submitted that the Judgment of the lower appellate Court was hit by the provision of Order 41, Rule 31 of the C.P. Code on the ground that no proper points for determination were framed and the reasonings given for dismissing the appeal were also recorded in a cursory manner. In view of this argument, I prefer to deal with this aspect initially before turning to the merits of the matter. No doubt, the lower appellate Court Judge is seen to have not framed the points for determination in traditional manner, however, paras 11 and 35 of her Judgment shows that such points were raised and answered. The first point, which according to the lower appellate Court, fell for her consideration was whether the trial Court was in error to appreciate the evidence and ultimately in non-suiting the plaintiffs and the finding thereon was

recorded in the negative. Similarly the next point which was framed was to the effect that whether the impugned decree warrants interference in appeal on the grounds of illegality, capriciousness or perversity. This point was also answered in the negative. No doubt that the points for determination are conspicuous by non-mentioning of the factual and evidential aspects sought to be raised, but are omnibus points which are not happily worded. However, this aspect, by itself, would not be sufficient to throw out the appeal or remand the matter to the lower appellate Court, especially when perusal of the entire Judgment shows that the learned lower appellate Court Judge has dealt with each and every aspect involved in the dispute referring to the issues decided by the lower appellate Court.

In this regard, I had occasion to decide this very point while deciding the case in ***Genba Sahadu Modak vs. Suryakant Vitthal Modak and ors., 2006(1) AIR Bom R 347*** wherein I have observed that where it was seen that the lower appellate Court had not only taken each and every issue for discussion and has appreciated it properly which left no doubt that he had applied his mind to the facts and legal aspects involved in the case and, therefore, no prejudice was caused to the appellants and, in such cases, there was no reason to either remand the matter or to reverse the findings recorded by the lower appellate Court Judge as there was sufficient compliance with the provision of Order 41, Rule 31 of C.P. Code.

My this view is also fortified by the recent Judgment of the Supreme Court in the case of ***G. Amalorpavam and ors. vs. R.C. Diocese of Madurai and ors.***, (2006) 3 SCC 224 wherein the Apex Court has held that if it is possible to make out from the judgment of the appellate Court that there is substantial compliance with requirement of Order 41, Rule 31 and that justice has not thereby suffered, that would be sufficient compliance with the provision of Order 41, Rule 31 of C.P. Code. Where entire evidence has been considered and discussed in detail and conclusions and findings are supported by reasons even though no point has been framed, there is substantial compliance with the said provision. In view of this aspect, there is no doubt whatsoever that the lower appellate Court judgment, in this case, is not hit by the provision of Order 41, Rule 31 of C.P. Code.

6. Turning to the issues at hand, I must note that after perusing the entire evidence vis-a-vis the pleadings on record along with the questions of law sought to be raised by the appellants, I have no doubt whatsoever that those all the issues are fact and not substantial questions of law. Evidently, this is a case of alleged encroachment and the plea for removal of such encroachment and consequential demolition of the encroached structure. The only issue involved is whether the alleged encroachment is made in the property bearing Survey No.114/1 or not. On

perusal of the judgments of both the Courts below, I am satisfied that they have discussed the relevant evidence on record in its proper perspective while coming to the concurrent findings that the plaintiffs have failed to prove any such encroachment.

7. The Apex Court in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and ors.** (1999) 3 SCC 722 has categorically observed that the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under section 100 of the C.P. Code. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court, unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of earlier rulings of the Apex Court or were based upon inadmissible evidence or arrived at without evidence. In other words, the mere appreciation of the facts, the documentary evidence or the

meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. This exactly is the position in the present appeal and, therefore, I am inclined to hold that the questions sought to be raised at this stage are the questions of fact and cannot be held to be the substantial questions of law.

8. In the result, the appeal deserves to be dismissed and stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.